THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
302 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/19/14	SM	Unfavorable
	JU	
	CA	
	FP	

December 19, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 64** – Senator John Legg
Relief of Monica Cantillo Acosta and Luis Alberto Acosta

SPECIAL MASTER'S FINAL REPORT

THIS UNOPPOSED, NEGLIGENCE-BASED EQUITABLE CLAIM FOR $940,000, IN LOCAL FUNDS, AGAINST MIAMI-DADE COUNTY FOR NON-ECONOMIC DAMAGES IS BROUGHT BY THE TWO CHILDREN OF A PASSENGER WHO FELL IN A BUS AND SUFFERED A FATAL HEAD INJURY AFTER THE DRIVER STOPPED SUDDENLY TO AVOID A COLLISION.

CURRENT STATUS:

On December 21, 2010, an administrative law judge from the Division of Administrative Hearings, serving as a Senate special master, held a de novo hearing on a previous version of this bill, SB 60 (2011). After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported unfavorably. The same administrative law judge served as the Senate special master for the identical bill the following year, SB 50 (2012). The judge issued an effectively identical report and recommended that the bill be reported unfavorably. That report is attached as an addendum to this report.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Sandra Stovall. My responsibilities were to review the records relating to the claim

bill, be available for questions from the members, and determine whether any changes have occurred since the hearing, which if know at the hearing, might have significantly altered the findings or recommendation in the previous report.

According to counsel for the parties, no changes have occurred since the hearing which might have altered the findings and recommendations in the report.

The prior claim bill, SB 50 (2012), is effectively identical to the 2015 bill filed for the 2015 Legislative Session, except the full amount to be paid by Miami-Dade County under the claim bill correctly reflects the amount agreed upon in the settlement agreement ($940,000) rather than the entire amount of the judgment.

Respectfully submitted,

Sandra R. Stovall
Senate Special Master

cc: Debbie Brown, Secretary of the Senate

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

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404 South Monroe Street
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DATE	COMM	ACTION
12/2/11	SM	Unfavorable

December 2, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 50 (2012)** – Senator Ellyn Setnor Bogdanoff
Relief of Monica Cantillo Acosta and Luis Alberto Acosta

SPECIAL MASTER'S FINAL REPORT

THIS UNOPPOSED, NEGLIGENCE-BASED EQUITABLE CLAIM FOR $940,000, IN LOCAL FUNDS, AGAINST MIAMI-DADE COUNTY FOR NON-ECONOMIC DAMAGES IS BROUGHT BY THE TWO CHILDREN OF A PASSENGER WHO FELL IN A BUS AND SUFFERED A FATAL HEAD INJURY AFTER THE DRIVER STOPPED SUDDENLY TO AVOID A COLLISION.

FINDINGS OF FACT:

On November 12, 2004, at 2:28 p.m., Nhora Acosta, 53, and her friend Zunilda Vargas boarded a bus operated by the Miami-Dade Transit Authority (MTA). The bus was eastbound on SW 8th Street in Miami. Ms. Acosta was returning to work after having lunched with Ms. Vargas. Neither woman was elderly, handicapped, infirm, or burdened with packages; both were able-bodied and apparently healthy.

The bus was crowded, and there were no seats for the women near the front. They began walking down the center aisle to the rear of the bus, where seats were available in an elevated seating area. To access this raised seating platform, a passenger must climb two steps, which are incorporated into the center aisle. As Ms. Acosta and Ms. Vargas headed to the back of the bus, the driver, Fernando Arrieta, pulled away

from the bus stop and proceeded to drive eastward on SW 8th Street, in the right lane.

About 11 seconds after the bus began moving, an SUV traveling in the left eastbound lane began pulling into the right lane, in front of the bus. This maneuver took nearly 4 seconds to complete. Immediately upon changing lanes, however, the SUV began breaking. Mr. Arrieta simultaneously stepped on the bus's breaks, to avoid a rear-end collision with the SUV.

The SUV needed to stop suddenly because a jaywalker was standing in the middle of the road, in between the two eastbound lanes. Two vehicles in the left eastbound lane had come to a complete stop. (The SUV had changed lanes, moving left-to-right in front of the bus, to pass these vehicles on the right.) It is reasonable to infer, and the undersigned finds, that the jaywalker had not anticipated that the SUV would cut in front of the bus when he began to cross the eastbound lanes on SW 8th Street. When the SUV suddenly appeared in the right lane, ahead of, and moving faster than, the bus, the jaywalker froze, calculating that he might not beat the SUV if it failed to slow down. Once the SUV began to break, however, the jaywalker dashed in front of it, safely reaching the sidewalk 2 seconds later. The SUV continued forward, and the two vehicles in the left lane, which had stopped, now took off. The bus came to a complete stop in the right lane, at the curb. Twenty seconds had elapsed from the time the bus pulled away after picking up Ms. Acosta and Ms. Vargas.

Inside the bus, a tragic accident had occurred. At about the moment the SUV began to change lanes, Ms. Acosta stepped up onto the rear seating platform. Ms. Vargas, who was right behind her, did the same about 2 seconds later. When the bus stopped to avoid running into the SUV, both Ms. Acosta and Ms. Vargas lost balance. Ms. Acosta tripped over Ms. Vargas's leg and fell off the elevated platform, striking her head on the lower center aisle. The injury proved to be fatal. Ms. Acosta died the next day in the hospital, having never regained consciousness.

The foregoing findings are based not only on the testimony presented, but also on the undersigned's independent review of the videos that the bus's onboard cameras recorded.

Based on a careful review of the videos, the following chronology of the material events has been created:

Hour	Minute	Second(s)	Event
2PM	28	44	Front doors are open
		46	Acosta steps onto bus
		47	Vargas boards
		48-53	Acosta pays fare; begins walking to back of crowded bus
		53-56	Vargas pays fare; begins walking to back of crowded bus
		57	Bus starts moving forward
		57-59	Acosta and Vargas walking to back of moving bus
	29	00-06	Acosta and Vargas still walking to back of moving bus
		06-08	Acosta steps up onto rear seating platform; Vargas approaching her from behind
		08-12	SUV, moving left to right, pulls into the right eastbound lane, in front of bus
		09-10	Vargas steps up onto rear seating platform, behind Acosta
		09-16	Two vehicles have stopped moving in the left eastbound lane, one behind the other
		11-13	Drives applies the breaks
		12-13	Pedestrian stands between the left and right eastbound lanes; two vehicles are parked in the left lane, having stopped for the pedestrian
		12	SUV is breaking
		13-14	Vargas loses balance, begins to fall

		14-15	Acosta begins to trip on Vargas's outstretched leg, falls
		14-16	Pedestrian dashes, left to right, toward sidewalk, directly in front of the SUV in the right eastbound lane
		16-18	Acosta is down; Vargas recovers balance, stands without having fallen
		17	Bus is at complete stop; SUV proceeds eastbound
		17-21	Two vehicles in left lane drive off, eastbound
		29-33	Front doors open
		36	Driver gets up from seat
		40	Driver begins walking back

At the conclusion of the trial in the civil action that Ms. Acosta's daughter Monica and son Luis brought against Miami-Dade County, which will be discussed below, the jury returned a verdict in favor of the plaintiffs, awarding each of them $3 million for non-economic damages, i.e., "pain and suffering." No award for economic damages, e.g., lost earnings, was made because Ms. Acosta, a Venezuelan citizen, was in the U.S. illegally, having overstayed her tourist visa, and hence her children could not prove earnings from lawful employment.

The jury in the civil trial was asked to compare the negligence, if any, of Ms. Acosta; the unnamed pedestrian; the unnamed driver of the SUV; and Mr. Arrieta, and to apportion the fault between them by percentages. The jury determined that Mr. Arrieta's negligence was the sole cause of Ms. Acosta's fatal injury.

The undersigned considers the jury's apportionment of 100 percent of the fault to the bus driver to be inexplicable (except as the product of sympathy and emotion) and, ultimately, indefensible. Clearly, the unnamed pedestrian, who decided to cross a busy road outside of a marked crosswalk, acted recklessly and endangered himself and others. This jaywalker therefore owned the lion's share of the blame for this unfortunate accident, and the undersigned charges him with 90 percent of the fault. The unnamed driver of the SUV

was partially responsible for the accident; had he remained in the left lane and slowed to a stop, as the two vehicles in front of him did, it is likely that this accident would not have occurred. The undersigned places 10 percent of the blame on this driver. Mr. Arrieta's conduct in bringing the bus to a controlled, nonviolent stop to avoid rear-ending the SUV, which had stopped suddenly to avoid hitting the jaywalker standing the middle of the busy road, was reasonable under the circumstances.

The claimants argue that Mr. Arrieta was negligent in failing to wait for Ms. Acosta and her friend to sit down or grab a handrail. As will be discussed below, the standard of care does not generally require a bus driver to wait for a boarding passenger to sit down before pulling away, unless the passenger is elderly, infirm, disabled, etc., or the driver knows or reasonably should know of some reason (besides ordinary traffic conditions) that might cause him to make a sudden stop. Based on the evidence presented in this case, the undersigned finds that (a) both Ms. Acosta Ms. Vargas were able-bodied and apparently healthy; and (b) Mr. Arrieta had no reason to anticipate that a jaywalker soon would cross his bus's path and disrupt traffic. Thus, it is determined that Mr. Arrieta did not breach the duty of care by driving the bus while Ms. Acosta and Ms. Vargas were still in the process of finding seats.

Even if Mr. Arrieta were negligent in failing to wait for Ms. Acosta to take her seat before driving off, however, which the undersigned (based on the law and the evidence presented here) does not believe was the case, he was certainly not more responsible for the accident than the unnamed driver of the SUV. At most, therefore, Mr. Arrieta was 5 percent at fault, the SUV driver 5 percent responsible, and the jaywalker 90 percent to blame.

LEGAL PROCEEDINGS:

In 2005, the Monica and Luis Acosta, Ms. Acosta's children, brought a wrongful death action against Miami-Dade County based on the alleged negligence of the MTA employee, Mr. Arrieta. The action was filed in the circuit court in Miami-Dade County.

The case was tried before a jury in or around November 2007. The jury returned a verdict awarding Monica and Luis $3 million each for pain and suffering. As mentioned above, the

jury apportioned 100 percent the fault for Ms. Acosta's death to the bus driver, finding specifically that neither the jaywalker, the SUV driver, nor Ms. Acosta herself were in any way negligent in causing Ms. Acosta's death. On November 8, 2007, trial court entered a judgment against Miami-Dade County in accordance with the jury's verdict.

The county appealed the judgment. In April 2010, while the appeal was pending before the Third District Court, the parties agreed to a settlement of the case, under which the county, in exchange for a release of liability, would: (a) pay $200,000 to the claimants (which it since has done); (b) dismiss the appeal; and (c) support a claim bill in the amount of $940,000.

Upon the county's payment of $200,000, the claimants received net proceeds of $98,237.30, after deductions for attorneys' fees ($50,000) and costs ($51,762.70).

CLAIMANTS' ARGUMENTS: Miami-Dade County is vicariously liable for the negligence of its employee, Mr. Arrieta, who breached the duty of a common carrier to exercise the highest degree of care consistent with the practical operation of the bus by:

- Failing to wait for Ms. Acosta to take a seat before pulling away from the bus stop;
- Failing to pay attention to his surroundings while driving; and
- Slamming the brakes and making a sudden, violent stop.

RESPONDENT'S POSITION: The county supports a claim bill in the amount of $940,000. If the claim bill were enacted, the county would satisfy the award using the operating funds of the MTA.

CONCLUSIONS OF LAW: As provided in section 768.28, Florida Statutes (2010), sovereign immunity shields Miami-Dade County against tort liability in excess of $200,000 per occurrence.

The operator of a bus system is vicariously liable for any negligent act committed by a driver whom it employs, provided the act is with the scope of the driver's employment. See, e.g., Metro. Dade Cnty. v. Asusta, 359 So. 2d 58, 59 (Fla. 3d DCA 1978); Miami Transit Co. v. Ford, 159 So. 2d 261 (Fla. 3d DCA

1964). Mr. Arrieta was the county's employee and was clearly acting within the scope of his employment at the time of the accident in question. Accordingly, the negligence of Mr. Arrieta, if any, is attributable to the county.

As a general rule, the duty of a common carrier is "to exercise the highest degree of care consistent with the practical operation of the bus." Jacksonville Coach Co. v. Rivers, 144 So. 2d 308, 310 (Fla. 1962). That the bus stopped suddenly, however, is insufficient, without more, to establish negligence on the part of the driver, as the Florida Supreme Court announced in Rivers:

> Ruling out stops of extraordinary violence, not incidental to ordinary travel, as inapplicable to the stop which occurred here, the sudden stopping of the bus was not a basis for a finding that the bus was negligently operated, in the absence of other evidence, relating to the stop, of some act of commission or omission by the driver which together with the 'sudden' stop would suffice to show a violation of the carrier's duty. This is so because a sudden or abrupt stop, which could be the result of negligent operation, could as well result from conditions and circumstances making it entirely proper and free of any negligence.

Id. (emphasis added; reinstating directed verdict in favor of defense; quoting Blackman v. Miami Transit Co., 125 So. 2d 128, 130 (Fla. 3d DCA 1960)).

Here, the evidence establishes that the stop in question, while sudden and unexpected, was not extraordinarily violent and was incidental to ordinary travel, inasmuch as making a sudden stop in traffic, unexpectedly, is commonly understood to be one of the recurring inconveniences (and risks) of driving a motor vehicle. The evidence, moreover, does not establish that the driver failed to pay attention to his surroundings; rather, as the videos show, Mr. Arrieta reacted prudently and reasonably to an unexpected situation, namely the slowing of the SUV (which had just pulled ahead of the

bus) to avoid hitting a jaywalker who was standing in the middle of the road, in traffic.

The question whether the driver should have waited for Ms. Acosta to take a seat before putting the bus in motion is somewhat closer. Florida law, however, does not generally require that a driver wait for passengers to be seated before proceeding, although such a duty might arise where the driver prevents the passenger from taking a seat, Ginn v. Broward Cnty. Transit, 396 So. 2d 804, 806 (Fla. 4th DCA 1981), or reasonably could have anticipated the need to make a sudden stop, Metro. Dade Cnty. V. Asusta, 359 So. 2d 58, 60 (Fla. 3d DCA 1978). Indeed, courts have entered judgments as a matter of law against plaintiffs who have fallen on moving buses while on their way to a seat. See, e.g., Peterson v. Cent. Fla. Reg'l Transp. , 769 So. 2d 418, 421 (Fla. 5th DCA 2000)(affirming directed verdict in favor of bus operator, where plaintiff, who was carrying a large, rain-soaked bag, was injured in fall on bus while walking down a wet aisle to take a seat in the back); Artigas v. Allstate Ins. Co., 541 So. 2d 739, 740(Fla. 3d DCA 1989)(affirming summary judgment in favor of bus operator because, although plaintiff had fallen after boarding bus while on her way to seat, standard of care was not violated); Miami Transit Co. v. Ford, 159 So. 2d 261 (Fla. 3d DCA 1964)(bus operator entitled to JNOV where plaintiff, who had been proceeding to a seat, fell when bus made a sudden, but nonviolent, stop).

Claimants argue that the MTA's Procedures Manual required the driver to wait for Ms. Acosta to take a seat before starting to move, but this is not accurate. The manual requires the driver to wait only when the passenger is "an elderly person, customer with a disability, a person holding a child, or a person with arms full of packages." Ms. Acosta was none of these. Otherwise, the driver is instructed to "be careful not to make a sudden start or stop" when passengers are standing in the aisle or walking to a seat. Here, the evidence fails to prove that the driver was not being careful; rather, Mr. Arrieta was required to stop suddenly because of an unexpected situation over which he had no control and could not reasonably have anticipated. In any event, the Procedures Manual does not fix the standard of care. See Artigas, 541 So. 2d at 740 n.1.

Based on the foregoing legal principles, as applied to the evidence presented in the case, the undersigned makes the ultimate determination that the driver was not negligent, in that

he did not breach the standard of care owed to a passenger when he stopped his bus to avoid rear-ending an SUV, which had slowed suddenly to avoid striking a jaywalker who was standing in the middle of traffic.

ATTORNEYS FEES: Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." Claimants' attorney, Judd G. Rosen, Esquire, has submitted an affidavit attesting that all attorney's fees, lobbying fees, and costs will be paid in accordance with the limitations specified in the claim bill.

SPECIAL ISSUES: If enacted in its current form, the claim bill would direct that the entire judgment amount of $6 million be paid to Ms. Acosta's children. Thus, the bill needs to be amended to conform to the parties' settlement agreement, pursuant to which claimants have agreed to accept the smaller sum of $940,000.

At the time of her death in November 2004, Ms. Acosta was a citizen of Venezuela. She had come into the U.S. in July 2003 on a Non-Immigrant B2 (Visitor for Pleasure) Visa, which expired on January 22, 2004.

Monica and Luis Acosta are citizens of Venezuela. Monica Cantillo Acosta, who was in the U.S. on a Non-Immigrant B2 (Visitor for Pleasure) Visa for some period of time, had returned to Venezuela to attend school before her mother's death, apparently without having overstayed her visa. Luis Acosta, who was a teenager at the time of his mother's death, was in the U.S. in November 2004 on a Non-Immigrant B2 (Visitor for Pleasure) Visa, which had expired on June 18, 2004.

GENERAL CONCLUSIONS: This sad case arises out of a freak accident, which tragically cost Ms. Acosta her life. Clearly her children have suffered a grievous loss—one for which, in a perfect world, they would be richly compensated. The problem here is that the party who is mostly to blame for Ms. Acosta's death, the negligent jaywalker, was not identified. Nor was the driver of the SUV identified; yet that person, too, rightfully bears a smaller, but nontrivial, share of the fault. Although the bus driver's (and through him the county's) fair share of the blame falls in the range from 0 percent to 5 percent (and at the bottom end of

the range, in the undersigned's estimation), the jury decided to make the county pay the entire loss, assigning 100 percent of the fault to the bus driver. This was unfair and unsupportable based on the facts and law. The county's financial responsibility to the plaintiffs should not exceed $300,000 (5 percent of $6 million). Having paid $200,000, the county, at a minimum, already has satisfied two-thirds of its maximum liability—and probably has overpaid.

That said, the county did agree to support a claim bill in the amount of $940,000. This, in itself, is a compelling reason to support the bill, and should be given great weight. Nevertheless, the undersigned concludes that, on balance, the present settlement, if consummated via approval of this claim bill, would not be a responsible use of taxpayer money.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 50 (2012) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Ellyn Setnor Bogdanoff
Debbie Brown, Interim Secretary of the Senate
Counsel of Record